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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PORFIRIO JUAREZ,

Defendant and Appellant.

A102614

(Napa County  
Super. Ct. No. CR102288)

A jury found Porfirio Juarez guilty of two counts of aggravated sexual assault of a child, by rape and by oral copulation, and two counts of forcible lewd acts upon a child, by kissing and by penile touching of the victim's body. On appeal, Juarez urges us to reverse the conviction for lewd conduct based on penile contact, arguing this count was a lesser included offense of rape or, in the alternative, was not supported by sufficient evidence. We reject these arguments and affirm the judgment.

**BACKGROUND**

On August 11, 2000, Maria M. left home with her husband for an appointment. She left her four-year-old daughter, six-year-old son and ten-year-old son, who were playing together behind a closed door in the boys' bedroom. Maria told the children she would be back very soon and said they should take care of each other and not open the door. At the time, Juarez was also staying at Maria's home. Two months earlier, Maria's husband had met Juarez at a taco stand and felt sorry for him because Juarez had no food and no home. The family initially allowed Juarez to stay in their home, but in early

August they told him he would have to find a new place to live. Before Maria left the house on August 11, 2000, Juarez said he was going out and was about to leave.

When Maria returned home about an hour and 15 minutes later, the children were still in their room and Juarez was gone. Maria's daughter then came into the kitchen to talk with her. Using the nickname the family had for Juarez, the daughter said "Primo" was "a pig" and had "put his pee pee . . . here," pointing at her vagina. She also told her mother Juarez had "done a lot of ugly stuff" to her " 'pompaz,' " meaning her anus. After Maria calmed her daughter, who appeared "very scared," the girl took her mother into the bathroom to explain what had happened. She said, " 'I came to the bathroom and he opened the door and he kept telling me all the time, "Shhh. If you scream, your parents are going to kill you. And you should not scream for your brothers and you can't tell anybody because dogs are going to come at night and they're going to eat you, and the vipers are going to come and are going to get you and the monster will be with you." And then he closed my mouth and he asked me if I wanted to be his girlfriend. And he started kissing me.' " She reported Juarez also kissed her vagina. Behind the closed and locked bathroom door, Juarez took off the girl's pants and underwear and lay her down on the floor. She told her mother Juarez then " 'did a lot of very ugly stuff" on her "butt" and "put something in there" that hurt her a lot. The girl said that, when Juarez "finished with his pig stuff," he ordered her to go to her room and " 'get everything ready because we're going to go with a friend of mine.' " The girl ran to her room but did not come out because she was afraid Juarez would take her away. Juarez eventually left the house and never returned.<sup>1</sup>

Maria lowered her daughter's pants and saw blood on the panties. The girl's genital area and anus appeared irritated and swollen. Maria noticed the bathroom mat had been moved and a large amount of toilet paper was wadded up in the bathroom garbage can. She also noticed her daughter was wearing different clothes than earlier in

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<sup>1</sup> Maria M. testified Juarez also stole the family's tax refund check and some cash, but he was not charged with these offenses.

the day. When Maria asked about the clothes, the girl showed Maria where she had hidden them in her room. She explained they were wet because Juarez “had peed on top of her.” Maria put the clothes in a bag and called the police.

Nurse Elizabeth Cassinos conducted a sexual assault examination on the victim later that evening and found acute trauma to the genital area. The areas of trauma were bright red and slightly oozing, with “friction bleeding” under the tissues. Using a colposcope, Cassinos identified separate areas of microabrasions, although the girl’s hymen remained intact. She also found some dried secretions on the girl’s thigh. Cassinos concluded the genital injuries had been inflicted only hours before the examination and were caused by friction from a blunt force, such as a penis or a finger. The anus itself was normal.

A forensic analyst found semen in four samples taken from the victim’s clothing and from a towel and a tissue police had collected from the bathroom. A criminalist determined Juarez’s genetic profile matched the genetic profile of the sperm found in the semen stain on the victim’s underwear. Because this sperm fraction profile is quite rare (found in 1 in 120 billion Hispanics), the criminalist concluded the match was “very strong evidence” that Juarez was the source of the semen.

On November 14, 2000, Juarez was charged by information with: (1) aggravated sexual assault of a child under age 14, by rape (Pen. Code, §§ 261, subd. (a)(2), 269, subd. (a)(1));<sup>2</sup> (2) aggravated sexual assault of a child under age 14, by oral copulation (§§ 269, subd. (a)(4), 288a); (3) forcible lewd acts upon a child, by kissing the victim’s mouth (§ 288, subd. (b)); and (4) forcible lewd acts upon a child, by penile contact with the victim’s body (§ 288, subd. (b)). After three referrals for psychological evaluations, in February 2002 the trial court concluded Juarez was incompetent to stand trial and committed him to a state mental hospital for treatment. In October 2002, Juarez was found competent to stand trial. After a three-day trial, the jury found him guilty of all charges. The court sentenced Juarez to two consecutive terms of 15 years to life on the

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<sup>2</sup> All statutory references are to the Penal Code.

aggravated assault charges, plus a consecutive six-year term for the lewd conduct charge based on kissing the victim's mouth. The court also imposed a six-year sentence for the lewd contact by penile touching charge but ordered the sentence stayed pursuant to section 654.

## DISCUSSION

Juarez first argues his conviction for lewd conduct by penile contact with the victim's body (count four) must be reversed because it represents a lesser included offense of the forcible rape for which he was convicted in count one.

Generally, multiple convictions are permissible for a single act or indivisible course of conduct, and it is up to the sentencing court to determine whether execution of sentence for one or more of these convictions must be stayed pursuant to section 654 to avoid multiple punishment for the same act. (*People v. Sanchez* (2001) 24 Cal.4th 983, 987; *People v. Pearson* (1986) 42 Cal.3d 351, 354.) "A defendant, however, cannot be convicted of both an offense and a lesser offense necessarily included within that offense, based upon his or her commission of the identical act." [Citation.]" (*People v. Sanchez, supra*, at p. 987.) "Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117-118.) Juarez claims forcible lewd conduct is a lesser included offense of rape under both the "elements test" and the "accusatory pleading test." (See *People v. Lopez* (1998) 19 Cal.4th 282, 288-289 [describing the two tests].) We disagree.

"The elements test is satisfied when 'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]" [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]" (*People v. Lopez, supra*, 19 Cal.4th at p. 288.) The Supreme Court has

conclusively rejected Juarez’s argument that forcible lewd conduct is a lesser included offense of rape. In *People v. Pearson, supra*, the defendant argued lewd conduct in violation of section 288 is a lesser included offense of sodomy. (42 Cal.3d at pp. 354-355.) However, unlike sodomy, a conviction for lewd conduct upon a child requires proof that the defendant committed a lewd and lascivious act “with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . .” (§ 288, subd. (a).) Because lewd conduct on a child is defined in section 288 as a specific intent crime, whereas sodomy is a general intent crime (§ 286, subd. (c)), it carries an additional element to be proved and thus cannot be a lesser included offense of sodomy. (*People v. Pearson, supra*, at pp. 355-356.) Although generally it would seem that a person who commits sodomy is, at the same time, committing a lewd act, the court noted sodomy could be committed without lewd intent, for example if “committed for wholly sadistic purposes, or by an individual who lacks the capacity to form the required specific intent.” (*Id.* at p. 356.) Two years later, the Supreme Court extended this ruling to rape, which is also a general intent crime. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1029-1030; see § 261, subd. (a)(2)).) The court stated: “Though we were not confronted with the issue in *Pearson*, it is evident that the identical distinction exists between the crime of rape, which is a general intent crime, and the crime of committing a lewd act on a child. Accordingly, a lewd act on a child is not a necessarily included offense of either rape or sodomy.” (*People v. Griffin, supra*, at p. 1030.)

Juarez’s claim also fails under the accusatory pleading test, which considers “a lesser offense . . . included within the greater charged offense ‘ “if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.” [Citation.]’ [Citations.]” (*People v. Lopez, supra*, 19 Cal.4th at pp. 288-289.) The charging allegations in this case mirror the statutory definitions of the two crimes. For conviction of aggravated assault charged in count one, the jury had to find Juarez guilty of committing rape, a general intent crime. (See *People v. Griffin, supra*, 46 Cal.3d at p. 1030.) Yet, to convict him of forcible lewd conduct charged in count four, the jury had

to find Juarez committed penile contact with the victim's body using force, violence, menace and threat of bodily harm, and "with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires" of himself and the child. Because the charging allegations did not require proof of this intent for count one, count four cannot be considered a lesser included offense of count one.

Next, Juarez suggests forcible lewd conduct should be considered a lesser included offense of rape because the prosecutor purportedly relied on the same evidence of genital abrasions to prove both crimes. But the determination of whether a crime is a lesser included offense does not rest on the facts of any particular case. Rather, the question is whether *in all cases* the greater offense is necessarily committed when a defendant commits the lesser offense. (See *People v. Pearson, supra*, 42 Cal.3d at p. 356 [referring to "the precise question before us—whether sodomy must in all cases be committed" with the specific intent required under section 288]; see also *People v. Sanchez, supra*, 24 Cal.4th at p. 988 [question is what is possible "in the abstract"].)

In a related argument, Juarez contends the evidence is insufficient to support his conviction for forcible lewd conduct because there was no proof of penile contact with the victim's body "independent of the acts which constituted the rape charged in Count 1." Once again, this argument ignores the well settled rule that multiple convictions are permissible for laws the defendant violated while engaging in a single act or course of conduct. (*People v. Sanchez, supra*, 24 Cal.4th at pp. 987-988; *People v. Ortega* (1998) 19 Cal.4th 686, 692-693 [defendant may properly be convicted of two offenses arising from the same act so long as neither is necessarily included in the other].) To obtain convictions on both charges, the prosecution thus did not need to prove Juarez engaged in penile touching separate and apart from the act of rape—although it clearly tried to do so in this case, most likely in an (unsuccessful) effort to avoid a stay of the lewd conduct sentence pursuant to section 654. In any event, Nurse Cassinos' testimony provided evidence of several separate injuries to the victim's labial area beyond the abrasion she characterized as "a mounting injury . . . when someone gets on top of someone and [tries] to insert." In addition, Maria's testimony that her daughter's anus

appeared irritated, and the girl's assertion that Juarez had done "ugly stuff to [her] butt," were evidence of additional penile touching beyond what was done in attempting penetration.

Finally, it is of no moment that the trial court stayed imposition of sentence on the lewd conduct charge because it appeared "the jurors could have found that Count 1 and Count 4 were conceivably the same conduct." As noted, multiple convictions are permissible for a single act or indivisible course of conduct, even though multiple punishment for the same act is precluded by section 654. (See *People v. Sanchez, supra*, 24 Cal.4th at p. 987; *People v. Pearson, supra*, at p. 354.)

### **DISPOSITION**

The judgment is affirmed.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Pollak, J.